No. 14575

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELI B. CASTLEMAN, MARION V. CASTLEMAN, LOUIS FEUERMAN, JULIUS NOVEMBER, ELEANOR NOVEMBER, and BERNARD REICH,

Appellants,

vs.

HOWARD R. HUGHES, RKO PICTURES CORPORATION, RKO RADIO PICTURES, INC., THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, ELI B. CASTLEMAN, MARION V. CASTLEMAN and LOUIS FEUERMAN,

Appellees.

APPELLANTS' OPENING BRIEF.

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TOPICAL INDEX

PAGE

TABLE OF AUTHORITIES CITED

Rules

Statutes

Textbooks

No. 14573.

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APPELLANTS' OPENING BRIEF.

Jurisdictional Facts.

This is an appeal under Section 1291 of Title 28 of the United States Code from a Final Judgment of Dismissal of the District Court for the Southern District of California, Central Division. The Final Judgment was made and entered September 27, 1954, and appears beginning page 360 of the Record.

Notice of Appeal was filed on October 4, 1954, and appears on page 362 of the Record.

The action dismissed was a minority stockholders' derivative action or class action under Rule 23 of the Federal Rules of Civil Procedure against Howard R. Hughes,

RKO Pictures Corporation, RKO Radio Pictures, Inc., and another. It was an equitable action for an accounting and other relief principally against Hughes who, it was alleged, was liable to the RKO Companies for waste, negligence and mismanagement of its affairs and with violation of his fiduciary duty in connection with the substantial profit made by him as the result of certain stock transactions. It was estimated that Hughes was liable to RKO for over $38,000,000.00 [R. 266].

Without trial or the taking of any testimony, the action was dismissed with prejudice and motions by plaintiffs' attorney of record for fees and costs against the defendants and against the plaintiffs were denied.

This appeal also brings up for review the failure to grant petition of the appellants, Julius November and Eleanor November, to intervene in the action, as well as other acts and omissions, of the District Court.

The District Court rendered no opinion but filed a "Memorandum Granting Motion to Dismiss" which appears on pages 356 and 357 of the Record.

The Motion to Dismiss Appeal.

By motion dated October 25, 1954, the appellants and appellees Eli B. Castleman, Marion V. Castleman, and Louis Feuerman, moved this Court to dismiss the appeal on the grounds:

> "(a) That the purported appellants Eli B. Castleman, Marion V. Castleman, and Louis Feuerman, designated in the Notice of Appeal as 'appellants' are not appellants herein and that the Notice of Appeal

purportedly served on their behalf was served without their authority and in contravention to their express wishes;

"(b) That the purported appellants Julius November, Eleanor November and Bernard Reich, not being parties to the record in the case below, are not persons who are entitled to appeal;

"(c) That the purported appeal, having no foundation in law or fact, has not been taken in good faith."

The opposing papers admitted that the appeal herein was taken without the consent of the appellants Castleman and Feuerman, but it was alleged that this was a class action and that the said appellants had acted collusively in consenting to the judgment below.

On November 30, 1954, this Court (Honorable Healy, Orr, Pope, *C. J.*) denied the motion to dismiss the appeal.

On January 25, 1955, this same Court entered an order denying the same appellants-appellees' motion for resettling Order of November 30, 1954.

The extraordinary circumstances of this case require some explanation of why counsel has designated himself as attorney for the appellants, including three who have not authorized him to take the appeal. Rather than restate this explanation we have appended to this brief the unpolished and unedited remarks made to the District Court on July 12, 1954, which may be found in the Record beginning on page 376. These remarks and the statements of the case which follow, we submit, will satisfy the Court's interest in the problem.

Concise Statement of the Case.

There follows under this heading a short statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

On December 13, 1952, New York counsel for the plaintiffs retained Bernard Reich to file and prosecute in California the class action filed below. Thereafter and without Reich's knowledge or consent the plaintiffs and defendants combined to deprive the District Court of jurisdiction and to transfer jurisdiction to a Nevada state court where the action was settled or "tried" without a truly adversary proceeding, contrary to the interests of the stockholders. That Court dismissed the case, although it awarded $160,000.00 in attorneys' fees and costs.

In the meantime the action filed below by Reich, local attorney of record for plaintiffs, was first dismissed on June 26, 1953, without his knowledge or consent, then when restored at his instance against the opposition of plaintiffs and defendants, was delayed and buffeted about until the Nevada action was determined.

Motions designed to investigate the Nevada action and the arrangements between the parties against the best interests of RKO stockholders, and which sought a hearing on the issues which had to be determined before defendants' motion to dismiss for *res judicata,* were, to use the language of the District Court, "put to sleep", continued, marked off-calendar, and never determined. This non-action was also true with respect to timely petitions by the appellants November and other stockholders to intervene.

Again defendants moved to dismiss below. Plaintiffs consented to the dismissal over Reich's opposition. Reich

had never been substituted out and he continued to stay and act in the case as attorney for all RKO stockholders including the proposed interveners, the appellants November.

This appeal brings up not only the judgment of dismissal, but the failure of the trial court to determine the Novembers' motion to intervene, the various motions to appoint a special master, and for a trial or hearing on the issues of collusion and so forth.

It brings up for review the question as to whether the Nevada judgment is *res judicata,* and whether a Delaware state action (brought by some stockholders subsequent to the instant action and the Nevada action) to halt the sale of RKO assets to the appellee Hughes and determined adversely to plaintiffs, rendered the instant action moot.

Finally, the appeal brings up for review the denied counter-motions of the appellant Reich for fees and costs against the defendants-appellees and the plaintiffs-appellees.

Detailed Statement of the Case.

The action having been dismissed summarily, without trial or the hearing of testimony, the allegations of fact with respect to the defenses against the dismissal of the action and in support of the appellants' motions must be for the purposes of this appeal at least taken as true.

These facts are set forth in affidavits filed below which together with the pages of the Record at which they may be found are as follows:

> Affidavit of Bernard Reich in support of motion to vacate Order of Dismissal made June 26, 1953 [R. 44].

Affidavit of Bernard Reich in support of motion for the appointment of a Special Master under Rule 53 of the Federal Rules of Civil Procedure [R. 92].

Affidavit of Bernard Reich in support of motion to vacate part of Order of January 12, 1954, and for other relief [R. 135].

Affidavit of Bernard Reich in opposition to motion to dismiss [R. 242].

Affidavit of Bernard Reich in support of motion for fees and costs as against plaintiffs [R. 264].

Affidavit of Bernard Reich in support of motion for counsel fees and costs against the defendants [R. 284].

The abovementioned Record citations will support the following ultimate facts and conclusions:

On December 13, 1952, New York attorneys Louis Kipnis and Leo B. Mittelman retained Reich to file and prosecute in California the class action filed below; they agreed to pay him 10% of any and all fees awarded anywhere, to pay further fees as may be determined by a named third person in New York, and to reimburse him for all costs.

On December 15, 1952, Reich filed the action below and on March 4, 1953, he filed an amended complaint which more specifically and in detail set forth the acts of waste, negligence and mismanagement of the defendant Hughes.

Beginning late in the year 1952, and after the filing of the action, Messrs. Kipnis and Mittelman in their own behalf and in behalf of the plaintiffs, and without Reich's

knowledge or consent, among other things, combined with the defendants to do the following:

(a) Withdrew the New York receivership proceedings previously filed;

(b) Filed a similar stockholder action in the state court in Las Vegas, Nevada, after the filing of the action below;

(c) Conferred jurisdiction of all of the stockholder actions filed by plaintiffs on the Nevada state court in Las Vegas, which required and consisted of the change of the residence of the defendant Hughes from California to Nevada, his submission and the submission of other non-resident defendants, including the corporations* and the directors thereof, to the jurisdiction of Nevada.

(d) Moved in the action below to quash service of process on defendant Hughes, prevailed on Reich to default on the said motion, and otherwise prevented him from contesting it;

(e) Caused the first dismissal of the action below, done June 26, 1953, in violation of the Local Rules of the District Court;

(f) Opposed the vacation of the said order of dismissal which was nevertheless done at Reich's instance;

(g) Acted to delay prosecution of the action below and to give preference to the subsequently filed Nevada action;

---

*RKO Pictures Corporation, the parent company, refused to submit without opposition to the jurisdiction in this action on the ground it was not doing business in California. The point was not pressed below because of the other problems.

(h) Acted in the Nevada action to give the appearance of a contested and adversary proceeding, but in truth and in fact entered into what was in effect a consent judgment;

(i) Consented to a form of judgment in the Nevada action, including provision for the payment of counsel fees and costs directly to the plaintiffs, which on its face purported to preclude Reich from obtaining compensation in the California action as against the defendants for the services rendered by him in the action below;

(j) Caused the final dismissal of the action below, done September 27, 1954;

(k) Opposed Reich's application for counsel fees and costs as against the defendants below.

Thus did the plaintiffs and their New York counsel combine with the defendants to deprive the court below of jurisdiction and to confer jurisdiction in virtually an uncontested proceeding on the state court at Las Vegas, Nevada.

On February 7, 1954, Mr. Hughes offered to purchase from RKO "all of its assets as of the date of transfer to (him), including any and all claims or causes of action of every kind or character against, or which might be asserted against, any person or persons including (him)." He agreed to pay for such assets the sum of $23,489,478.00 in cash upon transfer of the assets to him, said sum being equal to $6.00 per share of a total number of outstanding shares of 3,914,913.

The market price of RKO shares just prior to the said offer was $2.87 per share, so that Mr. Hughes was in effect offering to RKO $12,253,677.69 above the market price.

In February 1954, Mr. Hughes moved the Nevada court to dismiss the action against him on the ground that the said offer, if accepted by the corporation and approved by the stockholders, "will effectively extinguish all claims or causes of action against this defendant and will render this pending action moot as to this defendant." Plaintiffs *in Navada* did not oppose the motion, except to reserve the question of fees and costs, and the court, on April 1, 1954, entered final judgment of dismissal of that action—*not on the ground of mootness but on the merits and as a compromise of the action, this without notice to the stockholders.*

On April 15, 1954, the Nevada court filed its final order providing in part as follows [R. 238]:

> "7. That the plaintiffs Eli B. Castleman, *et al.,* on their motion, have established that they are entitled to recover from such fund their reasonable expenses; that a reasonable allowance to them for such expenses is as follows:
>
> For attorneys' fees, $125,000.00;
>
> For accountants' fees, $25,000.00;
>
> For disbursements for expenses of their attorneys, $8,000.00;
>
> For disbursements for expenses of their accountants, $2,000.00;
>
> that such allowance shall cover all fees for *all attorneys* who have appeared in *any* action, *wherever pend-*

> *ing,* on behalf of Eli B. Castleman, *et al.,* the plaintiffs in this action, and all accountants or others who have rendered any services on their behalf, *whether or not such attorneys or accountants have appeared in this Court."* (Emphasis added.)

In the meantime Reich had made efforts to have the court below exercise its jurisdiction; had sought the deposition of Hughes; had sought the appointment of a Special Master; and, when invited by the court, had appeared for the interveners November and had not opposed the petition to intervene by other stockholders.

The District Court wanted no part of this case. For example, on October 19, 1953, it stated [R. 370]:

> "The Court: May I say just a word? Counsel has done a lot of talking on both sides in this case, but so far as this court is concerned *it is going to put this case to sleep* until the Nevada case is determined * * * I know Judge McNamee. He is a very able man and a very scholarly man and I think as long as they have started through the wringer over there and that court has jurisdiction of the parties, *I am not going to bother with this mess."* (Emphasis added.)

After the case was finalized in Nevada, RKO moved the District Court herein to dismiss the case on the ground of *res judicata.* Over the opposition of Reich and the *interveners but not of the plaintiffs,* the District Court granted the motion to dismiss not only on the ground of *res judicata,* but on the further ground, that a subsequent Delaware action (which had before it only the issue of the validity of the sale of RKO assets to Mr. Hughes) rendered the action herein moot.

Specification of Errors.

It is respectfully submitted that the District Court erred:

1. In dismissing the action on September 27, 1954 before hearing and determining the defenses of collusion and the absence of a truly adversary proceeding in Nevada.

2. In ruling that the final judgment in the Nevada action was *res judicata* and compelled dismissal of the action herein.

3. In ruling that the Delaware action rendered the action herein moot and compelled its dismissal.

4. In refusing to try the case, in continuing it indefinitely, putting matters off calendar, refusing to rule on motions, and finally dismissing the case with motions and petitions pending and undetermined.

5. In failing to grant the timely motion and petition of appellants November to intervene in the action.

6. In failing to grant timely motions including:

(a) The whole of plaintiffs' motion to vacate order of dismissal made June 26, 1953;

(b) Motion to vacate in part Order entered January 12, 1954;

(c) Motion for appointment of Special Master.

7. In accepting and considering papers filed by Mr. Henry Herzbrun and Mr. Robert Silver, purportedly acting as attorneys for the plaintiffs without being substituted pursuant to the Local Rules of the District Court.

8. In denying the motions (2) for counsel fees and costs as against the defendants (other than the bank) and as against the plaintiffs.

ARGUMENT.

I.

The District Court Erred in Dismissing the Action Before Hearing and Determining Appellants' Defenses of Collusion and the Absence of a Truly Adversary Proceeding So as to Support Its Conclusion of Law That the Nevada Judgment Was Res Judicata.

A Foreign Judgment Is Subject to Attack for Fraud, Collusion and the Absence of a Truly Adversary Proceeding.

28 *U. S. C.*, Sce. 1738;

Fed. Rules of Civ. Proc., 60(b);

Note, *Binding Effect of Class Actions,* 67 Harv. L. Rev. 1059, 1060, 1062, 1065 (1954);

McLaughlin, Capacity of Plaintiff-Stockholder to Terminate Stockholders' Suit, 46 Yale L. J. 421, 424, 425 (1937);

Hansberry v. Lee, 311 U. S. 32, 40, 45, 61 S. Ct. 115, 117, 85 L. Ed. 22, 26 (1940);

United States v. Throckmorton, 98 U. S. 61, 65-66 (1878);

Earl of Bandon v. Becher, 3 Clark & F. 479-512 (6 Eng. Rep. 1517) (1835);

Duchess of Kingston's Case, 20 Howell State Trials 355, 478, 479 (1776).

Cf:

Dreadner v. Goldman Sachs Trading Corp., 240 App. Div. 242, 247-249, 269 N. Y. Supp. 360, 366-367 (N. Y., 1934);

Golconda Petroleum Corporation v. Petrol Corporation, 46 Fed. Supp. 23, 26 (D. C. Cal., 1942);

Webster Eisenlohr, Inc. v. Kalodner, 145 F. 2d 316, 323, 324 (C. C. A. 3, 1944).

It should be noted that the principles of *res judicata* and full faith and credit have their applicability by reason of Section 1738 of Title 28 of the United States Code, which in essence provides that the records and judicial proceedings of any state are entitled to the same full faith and credit in every court within the United States as they have by law or usage in the courts of such state from which they are taken. Obviously therefore Federal Rules of Civil Procedure 60(b), and the comparable provision of the Nevada Rules, which renders a judgment subject to attack for fraud, etc., is applicable not only in Nevada but in California.

> "It should be noted that the binding force of a particular action cannot be determined accurately by the court which hears the class suit, for that court is ill-equipped to test the adequacy of the representation of absent class members, the sufficiency of notice given, or even the general fairness of the proceeding. Since these questions can best be answered realistically with respect to a particular person, the ultimate effect of the class action judgment will be determined when it is introduced in a subsequent action to bind persons not parties to the original action.
>
> "*Adequate Representation*—The class action is premised on the theory that members of the class who are not before the court can justly be bound because the self-interest of their representatives will assure adequate litigation of the common issues. Where, however, the interests of absent class members have not been adequately represented, binding them by class judgment would seem to offend the requirements of due process. [Hansberry v. Lee, 311 U. S. 32, 40 (1940).] Thus, the class action in which the class

representatives colluded with the common adversary can have no effect upon those who did not participate."

67 Harv. L. Rev. 1059-1060.

In *Hansberry v. Lee, supra,* the Supreme Court stated (311 U. S. at p. 40):

"But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata,* is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes . . ."

In *United States v. Throckmorton, supra,* the Court stated (98 U. S. at pp. 65-66):

"But there is an admitted exception to this general rule in cases where, by reason of some thing done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiffs; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases *which show that there has never been a real contest in the trial or hearing of the case,* are reasons for which a new

suit may be sustained to set aside and annul the former judgment or decree, and upon the case for a new and a fair hearing. See, Wells *Res Adjudicata,* sec. 499; *Pearce v. Olney,* 20 Conn. 544; *Wierich v. DeZoya,* 7 Ill. (2 Gilm.) 385; *Kent v. Ricards,* 3 Md. Ch. 396; *Smith v. Lowry,* 1 Johns. Ch. 320; *DeLouis v. Meek,* 2 Green (Iowa), 55." (Emphasis added.)

In the *Earl of Bandon* case, the English court quoted from the *Duchess of Kingston* case as follows (6 Eng. Rep. at p. 1529):

> "A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled;—in order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defense, a real decision. Of all these requisites not one takes place in the case of a fraudulent and collusive suit; there is no judge, but a person invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question . . ."

On its own the English court case stated:

> "It is not an irregularity, it is not an error which is here complained of, but it is that the whole proceeding is collusive and fraudulent; and it cannot therefore be treated as a judicial proceeding, but may be passed by as availing nothing to the party who sets it up."

In *Donovan v. Carkner,* a decision of the New York Supreme Court, reported in the New York Law Journal for March 2, 1939, page 984, column 3, defendants' mo-

tion to stay a suit, pending a Delaware suit actually on trial, was denied because

> "there is . . . some basis for the plaintiff's belief that the unusual haste and cooperation which characterizes the action suggests a friendly stockholder's suit that will not fully represent the legitimate interests of the defendant Lott, Inc."

This record is replete with the "unusual haste and cooperation" which prevailed in the Nevada court, a suit filed subsequent to the action below [R. 97, 186, 370, 374].

II.

The District Court Erred in Ruling That the Final Judgment in the Nevada Action Was Res Judicata and Compelled Dismissal of the Action Herein.

In Addition to Being Subject to Attack for Fraud, Collusion and the Absence of a Truly Adversary Proceeding, a Foreign Judgment Is Subject to Attack for Lack of Due Process or Adequate and Sufficient Notice of Proceedings.

28 U. S. C., Sec. 1738;

Fed. Rules of Civ. Proc., 23(c), 54(a), 54(c);

Hansberry v. Lee, 311 U. S. 32, 40, 1 S. Ct. 115, 117, 85 L. Ed. 22, 26 (1940);

Holden v. Hardy, 169 U. S. 366, 389, 18 S. Ct. 383, 387, 42 L. Ed. 780, 790 (1898);

Galpin v. Page, 85 U. S. 350, 368, 369 (1873).

In the *Holden v. Hardy* case, *supra,* the Supreme Court stated (169 U. S. at p. 389):

> ". . . there are certain immutable principles of justice which inhere in the very idea of free government which no member of the union may disre-

gard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard . . ."

The papers in support of the motion below to dismiss on their face showed that the only motion leading to the final judgment in Nevada of which the stockholders had notice was a motion to dismiss on the ground of mootness [R. 200]. The motion was predicated on Mr. Hughes' intention to purchase the assets of RKO including the actions against him. The moving papers below showed that the Nevada action was not in fact or in law dismissed on the ground of mootness or any other grounds of which the stockholders had notice [R. 226, 231]. What happened was that at the instance of the defendants, the Nevada court converted the motion so as to approve the sale of the assets as a "compromise" of the law suits [R. 215, 243]. The stockholders were not given notice of the proposed "compromise" in accordance with Federal Rule 23(c), purported to be identical to the same numbered rule of the Nevada Rules of Civil Procedure.

The sense of the proceedings in Nevada was that the defendants first contended that the Hughes' offer was one to buy the assets, including the law suits, which would then render the stockholder suits moot. Once, however, the defendants obtained in Delaware an adjudication against vacating the sale, they sought to obtain the benefits of Rule 23(c).

The stockholders were not given notice that the Nevada Court would hear evidence on whether or not the offer of Mr. Hughes was a fair compromise of the law suits against him.

In order, however, to give to the Nevada decree respectability and lay foundation for the motion below to dismiss, the defendants in Nevada, without prior notice to the stockholders, introduced the issue of compromise under Rule 23(c).

The point is that the proceedings before the Nevada court were not actually contested. If the plaintiffs in Nevada represented all of the stockholders they violated their trust. If they represented only themselves then none of the stockholders, except the plaintiffs, had notice of the actual proceedings.

If the motion to dismiss was in effect granted by default, the Nevada court went beyond its jurisdiction since a judgment by default cannot be different in kind from the demand for judgment.

Federal Rules of Civil Procedure, 54(c).

Cf:

Dorsey v. Dorsey, 49 Cal. App. 2d 491 (1942);

Bennett v. Bennett, 50 Cal. App. 48 (1920).

We could document further each of the above allegations were we seeking a review of a judgment of a District Court, which, after hearing the evidence, ruled adversely to our claims. There is no such order. The District Court refused to take testimony on these issues and our only purpose in raising the point of due process is to show that the District Court erred in making no disposition of this claim.

III.

The District Court Erred in Ruling That the Delaware Action Rendered the Action Herein Moot and Compelled Its Dismissal.

In its Memorandum Granting Motion to Dismiss [R. 356] the District Court stated:

> "This case is one of several shareholders' derivative actions filed in both state and federal courts throughout the United States involving alleged injury to the same corporation at the hands of the same corporate officers. [For a detailed history of the events giving rise to this litigation see *Schiff v. RKO Pictures Corp.*, 104 A. 2d 267 (1954).]
>
> "Defendant RKO Radio Pictures, Inc., has made a motion to dismiss this action with prejudice. The occurrence of two events since the institution of this action compels that this motion be granted.
>
> "First, a sale of all of the assets of the corporation on behalf of which this action was brought to the corporate officer who is the alleged principal wrongdoer has been consummated. The terms of the contract of that sale provide that all causes of action held by the corporation against any person including that particular officer are to be a part of the assets sold. The validity of this sale has been upheld by the Delaware Chancery Court. [*Schiff v. RKO, supra.*] The effect of that sale is to render this action moot."

The *Schiff* case was a subsequent action by minority stockholders attacking the sale to Mr. Hughes of all the assets of RKO including all actions such as the action here.

We concede that the Delaware action is *res judicata* on the issue as to whether the sale was fair and that the

IV.

The District Court Erred in Refusing to Try the Case, Continuing It Indefinitely, Putting Matters Off Calendar, Refusing to Rule on Motions and Petitions and Finally Dismissing the Case With Other Motions Pending and Undetermined.

On October 19, 1953, the District Court said [R. 370]:

> "The Court: May I say just a word? Counsel has done a lot of talking on both sides in this case, *but as far as this court is concerned it is going to put this case to sleep until the Nevada case is determined.*
>
> *I am not going to hear it and I am not going to do anything with it that I don't have to do.*
>
> This case is pending in Nevada and I understand it is at issue over there. They are taking depositions and they are getting ready for trial. I know Judge McNamee. He is a very able man and a very scholarly man and I think as long as they have started through the wringer over there and that court has jurisdiction of the parties, *I am not going to bother with this mess.*
>
> You can fire him [Reich] or not, or he can just sit here and wait. If I don't die of old age first maybe he will." (Emphasis added.)

Before and after that statement, the court below did precisely what it said it would do.

On August 5, 1954, the date of its memorandum granting motion to dismiss, the court had pending before it the following motions as set forth in its Minutes of July 12, 1954 [R. 351]:

> 1. Motion of plaintiffs to vacate in part order docketed and entered January 12, 1954, and for other relief;

2. Application of plaintiffs for leave to take the deposition of Howard R. Hughes;

3. Further hearing motion of Bernard Reich, Esq., local attorney of record for the plaintiffs, for appointment of a Special Master, pursuant to Rule 53 of Federal Rules of Civil Procedure, and renotice of hearing, filed March 11, 1954;

4. Motion of plaintiffs and the proposed interveners, Julius November and Eleanor November, to add and join parties plaintiff, or for leave to intervene;

5. Motion of plaintiffs to quash depositions noticed by Louis Kipnis, Leo B. Mittelman and Robert Silver, Esqs., purported attorneys for plaintiffs, as noticed April 9, 1954, of witnesses Benjamin F. Schwartz, *et al.;*

6. Motion of defendant RKO Radio Pictures, Inc., for dismissal of this action, with prejudice, pursuant to notice, motion, points and authorities, and affidavit filed April 7, 1954, and orders of continuance;

7. Motion of Bernard Reich, attorney for plaintiffs, filed June 28, 1954, for counsel fees and costs from plaintiffs;

8. Motion of Bernard Reich, attorney for plaintiffs, and proposed intervenors, filed June 28, 1954, for counsel fees and costs from defendants other than the Chase National Bank.

The District Court failed to dispose of 1, 2, 3, 4 and 5.

We grant that these motions were rendered practically (not legally) moot by the District Court's non-action

pending the outcome of the subsequently-filed foreign suits. However, it is clear that this procedure of the District Court constituted reversible error.

McClellan v. Carland, 217 U. S. 268, 281-2, 30 S. Ct. 501, 504, 54 L. Ed. 762, 767 (1910);

Bedgisoff v. Cushman, 12 F. 2d 667, 668 (C. C. A. 9, 1926);

In re Howard, 130 F. 2d 534 (C. C. A. 5, 1942);

Schwab v. Coleman, 145 F. 2d 672, 677, 678 (C. C. A. 4, 1944);

United States v. 1 Dozen Bottles, 146 F. 2d 361, 363-364 (C. C. A. 4, 1944);

Lewis v. Manufacturers Casualty, 107 Fed. Supp. 465, 473 (D. C. La., 1952).

In the *McClellan* case, *supra,* the Supreme Court had before it for review an order below staying an action pending also a subsequently-filed state action. The Court stated (217 U. S. at pp. 281-282):

> "It cannot be denied that a circuit court of the United States, like other courts, had power to postpone the trial of cases for good reasons, but, by the orders made in this case, the Federal court withheld the further exercise of its authority until the state court, by its action in a case involving all the parties, might render a judgment which would be *res judicata,* and thus prevent further proceedings in the Federal court.
>
> * * * * * * * *
>
> ". . . In the present case, so far as the record before the circuit court of appeals discloses, the circuit court of the United States had acquired jurisdiction, the issues were made up, and when the state intervened, the Federal court practically turned the

case over for determination to the state court. We think it had no authority to do this, and that the circuit court of appeals, upon the record before it, should have issued the writ of mandamus to require the judge of the circuit court of the United States to show cause why he did not proceed to hear and determine the case."

In the *Bedgisoff* case, *supra,* this Court had before it a case where the district court had continued the action to after this country's recognition of Russia. This Court after stating (12 F. 2d at p. 668) that "The only question presented by this record for our determination is plaintiff's right to a hearing," held that the plaintiff was entitled to have his case tried.

In the *Howard* case, *supra,* the Fifth Circuit held that the district court erred in postponing determination of an issue pending decision of the Supreme Court in another case.

In the *Schwab* case, *supra,* the Fourth Circuit held that the district court erred in continuing indefinitely an application for citizenship on the ground that the war made a thorough investigation by the government of the applicant impossible. It stated (145 F. 2d at pp. 677, 678):

> "If the judge had passed upon the petitions of applicants and denied them naturalization, they could have appealed to us and asked a reversal of his decision, which could then have been reviewed by us in the light of the law and the evidence. We do not think that their right to such review can be defeated by continuing the hearing of the petitions over their protest. A continuance may, of course, be granted in naturalization cases as well as in others, and whether or not such continuance shall be granted is ordinarily a matter resting in the court's discretion;

but the discretion thus vested in the court is a sound, not an arbitrary, discretion; and it may not be exercised in such way as to result in the denial of the right of review to which a party is entitled.

* * * * * * * *

". . . Whether petitioners were entitled to naturalization or not, they were, at least, entitled to have their petitions passed upon so that they might appeal from an adverse decision to this court; and the continuance over their protest did not lie within the limits of judicial discretion as to granting continuances but amounted to a refusal to exercise power which petitioners had a right to have exercised. 35 Am. Jur., pp. 25, 26."

In the *1 Dozen Bottles* case, *supra,* the Fourth Circuit held that the power of the district court to condemn misbranded articles is not affected by power of the Federal Trade Commission to issue a cease and desist order and the withdrawal by the defendant of the offending circulars, stating (146 F. 2d at pp. 363-364):

"It should proceed to hear and determine the charges contained in the libel upon the merits since the right of a party litigant to the judgment of a court upon a matter properly before it is a fundamental aim of the law. Cohen v. Virginia, 6 Wheaton 264, 404, 5 L. Ed. 256, 257; Willcox v. Consolidated Gas Co., 212 U. S. 19, 40, 29 S. Ct. 192, 53 L. Ed. 382, 48 L. R. A., N. S., 1134, 15 Ann. Cas. 1034; McClellan v. Carland, 217 U. S. 268, 282, 30 S. Ct. 501, 54 L. Ed. 762; 35 Am. Jur. (Mandamus) §254, p. 25."

In *Lewis v. Manufacturers Casualty Ins. Co.,* 107 Fed. Supp. 465, 473-474, District Judge Porterie has so well

stated the problem and its answer that we hope we will be pardoned for quoting at some length. The learned judge stated:

"There is a controversy between plaintiffs and defendant. This Court, having jurisdiction to hear and determine it, must do so bindingly for any United States citizen, even a Louisiana citizen, regardless of the fact that, peculiar to our form of government (dual sovereignity and citizenship), a state court may also have jurisdiction to hear and determine it bindingly.

"The right being a substantive one and the remedy delineated and supplied, this Court, having jurisdiction, must hear and determine and bindingly decree the rights of the parties before it under the circumstances. That is exactly why Congress established and ordained this Court. That this case may be litigated in a state court or that the docket of this Court is congested, or that litigation floods here, is no answer, begs the question, and is no excuse for us to refuse to exercise the judicial power vested in us by the Congress, the Constitution, and the people of the United States, among the latter of which, incidentally, are these plaintiffs. That is a part of government of, by and for the people. *With such statutory sanction, defendant's apparent endeavor that this case be tried in a state court is reduced to a shadow.* The jurisdiction of this Court is not governed by statistics, or the momentum of cases here.

"Plaintiffs, being citizens of both sovereignties, have a right to be heard in either court; in any event they have a right to be heard here; and here they should be heard. *This Court cannot abdicate its authority or duty to a state court.* Suydam v. Broadnax, 14 Pet. 67, 39 U. S. 67, 10 L. Ed. 357; Presi-

dent, Directors and Company of the Union Bank of Tennessee v. Vaiden (Jolly's Adm'rs), 18 How. 503, 506, 59 U. S. 503, 506, ... L. Ed. 472; Chicago & N. W. Ry. Co. v. Whitton Adm'r, 13 Wall. 270, 80 U. S. 270, 20 L. Ed. 571; Chicot County v. Sherwood, 148 U. S. 529, 13 S. Ct. 695, 37 L. Ed. 546; McClellan v. Carland, 217 U. S. 268, 30 S. Ct. 501, 54 L. Ed. 762; Kline v. Burke Const. Co., 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077.

"We can no more refuse to hear a case where there is diversity, as here, than we can refuse to hear any other case arising under the Supreme Law of the Land. *A United States court must hear a United States citizen where there is jurisdiction such as is here present.*

* * * * * * * *

"We have seldom seen so dense a legal smoke screen thrown out in an attempt to create a complex and involved legal question where none exists. The Acts of Congress, above quoted, 28 U. S. C., §§1332, 1391, 28 U. S. C. A., §§1332, 1391, are clear enough. An attempt is made to raise a legal question by tacking adjectives to the word 'controversy' as used in the first-quoted Act and to the word 'Controversies' as used in our Constitution; or, by substituting for the word 'controversy' or 'Controversies' such phrases as 'principal purpose' or 'primary and controlling matter in dispute'; thus stepping the question out of character into nonanalogous fields, all in the face of well-established jurisprudence in point. Having executed this *coup d'essai,* tenuous arguments are built atop a foundation that is simply not the statute from whence argument is professed. This is legal fog." (Emphasis added.)

V.

The District Court Erred in Failing to Grant the Timely Motion to Intervene. Appellant Novembers' Motion to Intervene Should Have Been Granted as a Matter of Law.

By motion dated March 5, 1954, and filed March 11, 1954 [R. 175], the appellants November moved to intervene and to become parties plaintiff herein on the ground, among others, and supported by affidavits, that as RKO stockholders, the representation of their interest by the plaintiffs was inadequate and that they would be bound by the judgment. The motion should have been granted as a matter of right.

Fed. Rules Civ. Proc., Rule 24;

Dana v. Morgan, 232 Fed. 85, 91 (C. C. A. 2, 1916);

Cohn v. Young, 127 F. 2d 721, 724 (C. C. A. 6, 1942);

Wolpe v. Poretsky, 144 F. 2d 505, 507, 508 (C. A., D. of Col., 1944) (cert. den. 1944);

Twentieth Century-Fox Film Corporation v. Jenkins, 7 F. R. D. 197, 198 (D. C. N. Y., 1947).

In *Wolpe v. Poretsky, supra,* the court held that intervention could be had even after a final decree. It stated (144 F. 2d at p. 508):

> "The application to intervene was timely. Intervention may be allowed after a final decree where it is necessary to preserve some right which cannot otherwise be protected. Here at least one of the rights which cannot be protected without interven-

tion is the right of appeal. The court was, therefore, in error in denying appellants leave to intervene as a matter of right.

"In their motion to intervene appellants relied solely on Rule 24(b) of the Federal Rules of Civil Procedure, which relates to permissive intervention. However, had the intervention been permissive we think it would have been an abuse of discretion to deny it under the circumstances of this case. Adjoining property owners in a suit to vacate a zoning order have such a vital interest in the result of that suit that they should be granted permission to intervene as a matter of course unless compelling reasons against such intervention are shown.

"When they filed their petition for intervention appellants had all the rights of a party at that stage of the proceedings. This, of course, includes the right of appeal. Since the time for appeal had not expired when appellants sought to intervene they should be made parties with the right to appeal and all other rights a party might exercise at the time their intervention was filed.

"Reversed and remanded."

The plaintiffs and defendants below took the position in the District Court that the proposed interveners, the appellants November, were bound by the Nevada judgment which they said in turn was binding on the District Court and on all the stockholders, including the proposed interveners [R. 189, 344].

The District Court in effect denied the motion to intervene by taking it off calendar or otherwise refusing to act on it. Rather than seek mandamus the proposed in-

terveners adopted the better procedure of appealing from the final judgment.

> *Allan Calculators, Inc. v. National Cash Register,* 322 U. S. 137, 142, 64 S. Ct. 905, 908, 88 L. Ed. 1188, 1192 (1944).

We would add only one thing more to what has already been said: Other stockholders who had petitioned the District Court below to intervene in this action were referred by it to the Nevada state court. The appellants November, before they sought to intervene here, made their application to the Nevada state court. The applications of both were denied. The appellants November then sought intervention in the action below, which was resisted by the plaintiffs and defendants on the ground that the denial in the Nevada state court was *res judicata* here.

In other words, plaintiffs and defendants wanted no interference from anyone in fulfilling their plan to settle this case as between themselves.

The District Court, consistent with its attitude of *laissez-faire,* refused to hear and determine the petition of appellants November to intervene in the action. This in and of itself constituted error.

Please see Point IV, *supra.*

VI.

The District Court Erred in Failing to Grant Motions Timely Made.

A. It Was Error Not to Grant All of Plaintiffs' Motion to Vacate Order of Dismissal Made June 26, 1953.

This action was first dismissed on June 26, 1953. On the said date the only local attorney of record for the plaintiffs was Reich. Messrs. Louis Kipnis and Leo B. Mittelman, the New York lawyers for the plaintiffs, were not admitted, and had not qualified under the Local Rules, to practice before the District Court.

On June 26, 1953, the District Court made its order dismissing the action against all defendants. This order was made without the knowledge or consent of plaintiffs' only local attorney of record, and had been presented to the court without due compliance with its Minute Order of June 8, 1953, providing for service of the form of order on all counsel. We say without "due" compliance because a form of order was served on (1) plaintiffs' New York counsel (who it is alleged throughout this record conspired to transfer jurisdiction) and (2) apparently on a Mr. Henry Herzburn, purportedly, but not actually, attorney of record for plaintiffs [R. 42, 367].

We do not go into further details, because on Reich's motion the dismissal was set aside as having been inadvertently made [R. 132].

However, in its final order the District Court granted only partial relief whereas the motion was to vacate the whole of the order of June 26, 1953 [R. 42].

The District Court in its "Order Vacating Order Dismissing Action" entered January 12, 1954 [R. 131] set

aside the dismissal of June 26, 1953, but permitted the remainder of the order with respect to the quashing of process on Mr. Hughes to stand. This, it is respectfully submitted, constituted error for the following reasons:

The motion to vacate the *whole* of the order was unopposed, the defendants other than Hughes remaining mute and filing no papers in opposition as required by Local Rule 3(d),[1] and the only other defendant, Hughes, being represented by counsel whose motion to appear as *amicus* was denied [R. 71-72].

The motion to vacate the "inadvertent" order of dismissal of June 26, 1953, was predicated on an invalidity that went to the whole of the order, to wit: that the form of the order not having been properly served pursuant to Local Rule 7(a)[2] and the Minute Order of June 8, 1953, and not having been served in any event on a responsible attorney of record under Local Rule 1(d), *infra, was void on its face or at least voidable in its entirety on motion.*

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[1]Local Rule 3(d) Requirements for Submission:

* * * * * * * *

"In the event an adverse party fails to file the instruments and memorandum of points and authorities provided to be filed under this rule, such failure shall be deemed to constitute a consent to the sustaining of said pleading or the granting of said motion or other application."

[2]Local Rule 7(a) Findings, Judgments, etc.:

* * * * * * * *

"No document governed by this rule shall be signed by the judge unless opposing counsel shall have endorsed thereon an approval as to form, or shall have failed to file with the judge, within five days from the time of the receipt of a copy thereof, as such time is shown on the original or by affidavit of service, a written detailed statement of the objections thereto and the reasons therefor."

Cf.:

49 *C. J. S.* 499, Judgments, Sec. 278;

Carter v. Shensako, 42 Cal. App. 2d 9 (1940).

We do not labor this point since, to omit unnecessary technicalities, a subsequent motion was made directly attacking the quashing of the service, on Mr. Hughes, a point next considered.

B. The District Court Erred in Not Granting the Motion to Vacate That Part of the Order of Dismissal of June 26, 1953, Which Quashed Service of Process on Hughes.

When the District Court by its order of January 12, 1954, vacated the dismissal but permitted the quashing of service to stand, a motion was filed on February 4, 1954, to set aside this latter part of the order of January 12, 1955 (quashing), for fraud, mistake, and inadvertence and to open the default of the plaintiffs on Mr. Hughes' motion to quash [R. 134-135].

The motion was supported by an affidavit [R. 135-172] and should have been granted for the following reasons:

1. The District Court had statutory and inherent power to vacate that part of the order entered January 12, 1954, which quashed the service of process on the defendant Hughes and to set aside plaintiffs' default taken June 8, 1953.

Fed. Rules of Civ. Proc., 60(b);

Universal Oil Products Co. v. Root Refining Co., 328 U. S. 575, 66 S. Ct. 1176, 90 L. Ed. 1447 (1946);

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1944).

2. A default taken in violation of an agreement amounts to an extrinsic fraud.

Johnson v. Johnson, 81 Cal. App. 2d 686, 687, 688 (1947);

McKeever v. Superior Court, 85 Cal. App. 381, 384 (1927).

The agreement in this case so far as concerned Reich and the RKO stockholders was that plaintiffs would default on the motion to quash on condition that the action otherwise would be contested. Plaintiffs' New York attorneys and defendants never intended to fulfill that agreement. This constituted fraud.

Civ. Code, Sec. 1572, subd. 4;

United States v. Throckmorton, 98 U. S. 61, 65-66 (1878).

3. Even if the conduct of plaintiffs' New York attorneys and the defendants did not constitute fraud, the moving papers supported the setting aside of the default for mistake, inadvertence and excusable neglect.

Fed. Rules of Civ. Proc. 60(b).

The mistake, inadvertence and excusable neglect or surprise was on the part of Reich who would not have defauted had he not believed that the plaintiffs' New York attorneys and the defendants would proceed with the action below as a contested matter and not have the action dismissed pursuant to a combination to deprive the District Court of jurisdiction and to confer jurisdiction on the Nevada court.

Moreover, Rule 60(b) affords still another ground, to wit: newly discovered evidence which by due diligence

could not have been discovered until July 1, 1953, because it was not until that time that Reich discovered that the plaintiffs' New York attorneys and the defendants without his prior knowledge and consent had obtained a dismissal of the action.

It is this first dismissal of the action without the prior knowledge or consent of the plaintiffs' attorney of record which lends more than ample credence to the untried charges of collusion and the absence of a truly adversary proceedings.

Again, we do not wish to labor the point by reference to the affidavits in the record, since the District Court erred in not hearing and determining the motion.

Please see Point IV, *supra.*

C. The District Court Erred in Not Hearing and Determining Favorably the Motion for the Appointment of a Special Master to Investigate the Charges of Conspiracy and Collusion.

Universal Oil Products Co. v. Root Refining Co., 328 U. S. 575, 90 L. Ed. 1447, 66 S. Ct. 1176 (1946);

Citrin v. Greater New York Industries, Inc., 79 Fed. Supp. 692, 696 (D. C., N. Y., 1948);

Schlessinger v. Ingber, 29 Fed. Supp. 581 (D. C., N. Y., 1939).

Cf.:

Webster Eisenlohr, Inc. v. Kalodner, 145 F. 2d 316, 323, 324 (C. C. A. 3, 1944).

Again we do not labor this point, since the District Court simply did not hear and determine.

Please see Point IV, *supra.*

VII.

The District Court Erred in Accepting and Considering Papers Filed by Mr. Henry Herzburn and Mr. Robert Silver, Purportedly Acting as Attorneys for the Plaintiffs Without Being Substituted Pursuant to the Local Rules of the District Court.

The appearances of these attorneys in this action were insidious. The name of Henry Herzburn appears first on the form of order of June 26, 1953, which he did not sign, not being the attorney of record. "Harry," actually Robert, Silver appears first in the Minutes of October 19, 1953, with Louis Kipnis as "counsel for the plaintiffs" [R. 118]. The same Minutes show that Mr. Silver, of counsel for plaintiffs, moved the admission of Mr. Kipnis to practice for the purpose of this case only. Later, Mr. Silver moved similarly for the admission of Mr. Mittelman [R. 182].

The question is: how did Mr. Silver who moved the admissions of Mr. Mittelman and Mr. Kipnis become attorney for plaintiff. The answer: he never did.

The Minutes of October 19, 1953 show that the plaintiffs, through Mr. Silver and Mr. Kipnis, moved to enjoin Reich, the attorney of record, from proceeding "as alleged counsel for the plaintiffs," and "substituting Henry Herzburn, Esq., for said Bernard Reich, Esq., as local attorney of record for the plaintiffs herein."

The District Court then announced its policy of putting the case to sleep [R. 370] and continued all proceedings to December 28 (or 29th), 1953, and so forth until July 12, 1954 [R. 351].

The only authorized appearance in this case for the plaintiffs was by Reich. It would have taken an order of court to terminate his authorization.

Rules of Civ. Proc. for the United States Dist. Ct. for the South. Dist. of Calif., 1(e), (2);

United States v. McMurtry, 24 F. 2d 145, 146 (D. C., N. Y., 1927);

Kellogg v. Winchell, 273 Fed. 745, 746 (D. C., Cal., 1921).

Moreover, until there has been a substitution, the attorney of record has the exclusive right to appear and to be recognized as attorney for the party.

Local Rules,[1] 1(e)(2) and (3);

Wells Fargo & Co. v. City and County of San Francisco, 25 Cal. 2d 37, 42-43 (1944);

Drummond v. West, 212 Cal. 766, 769 (1931).

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[1]Local Rule 1(d) Non-Resident Attorneys:

"Only a member of the bar of this court may enter appearances for a party, sign stipulations or receive payment or enter satisfaction of judgment, decree or order. However any member in good standing of the Bar of any United States court, or of the highest court of any State or of any Territory or Insular possession of the United States, who has been retained to appear in this court, and who is not a resident of this district, or does not maintain an office in this district for the practice of law, may be permitted after application, without previous notice, to appear, and participate in a particular case. Such applicant shall designate, in his application so to appear, a member of the bar of this court who maintains an office in this district for the practice of law, with whom the court and opposing counsel may readily communicate regarding the conduct of the case. He shall also file with such application the address, telephone number and written consent of such designee. Such permission to appear being a limited one, no certificate of admission shall be issued by the Clerk."

The footnotes on page 41 apply here.

Neither Mr. Herzburn nor Mr. Silver was substituted for Reich by order, stipulation, or otherwise.

Neither Mr. Herzburn or Mr. Silver nor anyone else was designated by Mr. Kipnis or Mr. Mittelman to act as local attorney of record as provided by Local Rule 1(d).[2]

Notwithstanding the state of the record the District Court accepted the consent of plaintiffs, through unauthorized counsel, to the first dismissal of June 26, 1953, and to the final dismissal of September 27, 1954; and the District Court sustained their objections to trying the issues of conspiracy and collusion brought against them.

In other words, plaintiffs were permitted to have their cakes and to eat them. They were permitted "to appear" in the action by other counsel contrary to law and without having to pay the price of a substitution.

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[2]Local Rule 1(e)(2): "Whenever a party has appeared by attorney, he may not thereafter appear or act in his own behalf in the action, or take any step therein, unless an order of substitution shall first have been made by the court, after notice to the attorney of such party, and to the opposite party; provided, that the court may in its discretion hear a party in open court, notwithstanding the fact that he has appeared, or is represented by attorney."

Local Rule 1(e)(3): "When an attorney of record for any reason ceases to act for a party, such party should appoint another attorney or appear in person, and may be required so to do on motion and notice to such party. Until this is done, the authority of the attorney shall continue for all proper purposes."

The footnote on page 40 applies here."

VIII.

The District Court Erred in Denying Appellant Reich His Fees and Costs Against the Defendants.

This appellant's affidavit in support of the motion for fees and costs [R. 284] alleged that he expended in excess of 810 hours, that Mr. Hughes' offer of some 23½ million dollars was now admittedly an offer to compromise, that this sum represented a dollar value to the law suits of between 2 million (the figure considered by the Delaware court) (104 A. 2d at p. 276) and 12 million (the difference between market value and the offer), and that Messrs. Kipnis and Mittelman had been paid $125,000.00 in fees *for their defeat* in Nevada.

It was this appellant's position below that if it were not for him, Mr. Hughes would have had his way with plaintiffs and their New York attorneys, making it unnecessary to offer to purchase the assets; and that in any event his services contributed to the benefits bestowed on the corporate defendants. This appellant opposed the motion to dismiss but in the alternative moved for fees and costs against the other appellees. It was error to deny this motion.

A. An Attorney in a Stockholder Derivative Action Represents All of the Stockholders for the Benefit of the Corporation.

Trustees v. Greenough, 105 U. S. 527, 532 (1881);

Young v. Higbee Co., 324 U. S. 204, 65 S. Ct. 594, 89 L. Ed. 890 (1945);

Monaghan v. Hill, 140 F. 2d 31 (C. C. A. 9, 1944);

Meighan v. American Grass Twine Co., 154 Fed. 346, 347 (C. C. A. 2, 1907);

Greenough v. Coeur D'Alenes Lead Co., 52 Idaho 599, 18 P. 2d 288 (1932).

Because of the said principle, it is apparent that defendant appellees can take no comfort in the abortive discharge of counsel who carried on in the interests of all stockholders.

Golconda Petroleum Corporation v. Petrol Corporation, 46 Fed. Supp. 23, 26 (D C., Cal., 1942);

Walker v. Felt, 54 Cal. 386, 387, 388 (1880);

Scott v. Donahue, 93 Cal. App. 256, 258 (1928).

Headnote 8 of the *Golconda Petroleum* case, *supra,* summarizes the point of the case as follows:

"Where federal court action was brought by first corporation against second corporation involving dispute concerning oil royalties, and subsequently second corporation obtained controlling interest in first corporation, and minority stockholders of first corporation were permitted to intervene, in order to protect their rights, first corporation's motion to substitute an attorney in place of attorney first authorized to bring the action was denied, since the result would be

to have second corporation appointing the attorney to conduct litigation against itself. Federal Rules of Civil Procedure, Rules 23, 24, 28 U. S. C. A. following section 723c; Jud. Code, §24, 28 U. S. C. A., §41."

In the course of this decision the court stated (46 Fed. Supp. at p. 26):

"The motion of Golconda Petroleum Corporation, plaintiff, to substitute an attorney in the place and stead of the attorney first authorized by Golconda Petroleum Corporation to bring the action, is denied. *The ends of Justice would not be served in permitting the defendant corporation to appoint an attorney to conduct the litigation against itself.*" (Emphasis added.)

In *Walker v. Felt, supra,* the California Supreme Court held that an attorney who did not represent the real party in interest, but who filed a stipulation for dismissal because he did not wish to prosecute the action any further, had imposed and perpetrated a fraud on the court.

In *Scott v. Donahue, supra,* the California court had before it the problem as to whether a plaintiff in a class suit could defeat the rights of the class by making an assignment of its interest. The court held that the attempted substitution of counsel was a breach of the good faith owed the members of the class.

Thus RKO in this case, as in the *Golconda* case, *supra,* and the plaintiffs in this case, as the plaintiff in the *Scott* case, *supra,* cannot repudiate the appellant Reich as concerns the services he rendered the corporation and its stockholders.

B. Since No Fund at All Is Necessary to the Jurisdiction of the Court It Was Not Necessary for the District Court to Find a Fund Within Its Jurisdiction From Which to Award Fees. Equity Will Deem the Fund or Benefit to the Corporation Before the Court.

Monaghan v. Hill, 140 F. 2d 31 (C. C. A. 9, 1944) (Appointment of Receiver);

Williamson v. Collins, 243 Fed. 835 (C. C. A. 6, 1917) (Bond issue cancelled and deed set aside);

Colley v. Wolcott, 187 Fed. 595 (C. C. A. 8, 1911), referring to *Colley v. Sapp,* 44 Okla, 16, 27-31, 142 Pac. 1193-1195 (1914) (Cancellation of mortgage and claims against corporation);

Neuberger v. Barrett, 180 Misc. 222, 39 N. Y. S. 2d 575 (N. Y. Sup. Ct., 1942) (Change in accounting practices *re* management profit-sharing plans);

Hornstein, New Aspects of Stockholder's Derivative Suits, 47 Col. L. Rev. 1 (1947), footnotes 78, 81 and 83, citing, *inter alia*:

Corash v. Texas Corp., N. Y. Law Jour., March 2, 1943, p. 830, N. Y. Sup. Ct. (Issuance of stock to shareholders);

Posen v. Cowdin, N. Y. Law Jour., June 3, 1943, pp. 2164-2165, N. Y. Sup. Ct. (Merger of two corporations and issuance of new stock.)

The attention of this Court is directed in particular to *Meighan v. American Grass Twine Co.,* 154 Fed. 346 (C. C. A. 2, 1907), where there was a fund; but, as in the instant case, it was paid directly to the corporation. The Second Circuit held that the attorney who had brought a bill in equity to enforce his attorney's lien had in fact

represented the corporation and obtained for it a large benefit, and that therefore the corporation was responsible for his fees. Thus, the court recognized an attorney's lien in a situation where there had never been a fund in court or even in the shareholders' hands.

Because of the above principles the fact that the settlement was consummated in Nevada, Delaware or New York is immaterial.

C. The Courts Will Nullify All Efforts on the Part of Defendants to Evade Payment of the Compensation Which an Attorney Is Equitably Entitled to Receive.

Hornstein, The Counsel Fee in Derivative Suits, 39 Col. L. Rev. 784, 809 (1939);

Meighan v. American Grass Twine Co., 154 Fed. 346 (C. C. A. 2, 1907);

Princeton Coal & Mining Co. v. Gilchrist, 51 Ind. App. 216, 99 N. E. 426 (1912);

Greenough v. Coeur D'Alenes Lead Co., 52 Idaho 599, 18 P. 2d 288 (1932).

Hornstein, citing authority, states (39 Col. L. Rev. at p. 809):

> "The courts have nullified all efforts by defendants to evade payment of the compensation which complainant or his attorney is equitably entitled to receive. Plaintiff's counsel is held entitled to compensation where the defendants settled out of court and paid directly to the corporation the moneys sued for. He is entitled to compensation from all members of the class, even though defendants secure releases from all stockholders other than the plaintiff. *He is also entitled to compensation even though his immediate client, the complainant, may be 'bought out'*

after successful suit, and pending or during the course of the accounting thereby ordered, or prior to payment of final judgment." (Emphasis added.)

Thus in the instant case, the fact that plaintiffs and their New York counsel settled both the action and the question of counsel fees with Messrs. Kipnis and Mittelman in Nevada does not bar plaintiffs' California counsel of record from obtaining compensation.

As stated in the *Greenough* case, *supra,* the question still is whether the settlement was induced in whole or in part by the action below.

D. The District Court's Memorandum Granting Motion to Dismiss [R. 356] Analyzed With Respect to Fees and Costs.

First, we quote from it:

> "The motion of local counsel, Bernard Reich, for attorney's fees and costs must be denied. Local counsel was employed to bring this action by New York counsel for plaintiff-shareholders Castleman. Employing counsel has been the recipient of an award of attorney's fees made in the Nevada action heretofore referred to. Local counsel must look to his employer and not to this court for his fee. Even if this were not the case the court could not make an award of fees to local counsel because the Nevada court has held that no counsel representing plaintiffs Castleman in actions pending elsewhere is entitled to any fee other than that allowed by it."

Then, breaking it down:

1. *"The motion (sic) of local counsel, Bernard Reich, for attorney's fees and costs must be denied."*

The District Court's decision is obviously addressed to counsel's motion for attorney's fees and costs against the defendants.

Since there were probably about a half dozen motions pending on July 12, 1954, the court must be forgiven for overlooking the second motion for attorney's fees and costs *against plaintiffs.*

> 2. *"Employing counsel has been the recipient of an award of attorney's fees made in the Nevada action heretofore referred to."*

While employing counsel did eventually receive $125,000.00 counsel fees, the order of the Nevada Court directed that payment be made to *the plaintiffs* to "cover all fees for *all attorneys who appeared in any action, where ever pending,* on behalf of Eli B. Castleman, *et al.*" [R. 238.]

Plaintiffs therefore received the fees in trust for all attorneys who appeared in any action, wherever pending, including the California action; and thus local counsel Bernard Reich's motion for fees herein against the plaintiffs who actually received the money was perfectly valid.

> 3. *"Local counsel must look to his employer and not to this court for his fee."*

Of course, counsel was not looking to the Court for his fee. As pointed out, *infra,* he was looking to his clients but with the help of the Court to which he was entitled.

> 4. *"Even if this were not the case this court could not make an award of fees to local counsel because the Nevada court has held that no counsel representing plaintiffs Castleman in actions pending elsewhere is entitled to any fee other than that allowed by it."*

Paragraph 7 of the Final Order of the Nevada Court, filed April 15, 1954 provided [R. 238]:

> 7. "That the plaintiffs Eli B. Castleman, *et al.*, on their motion, have established that they are entitled to recover from such fund their reasonable expenses; that a reasonable allowance to them for such expenses is as follows:
>
> | | |
> |---|---|
> | For attorneys fees | $125,000.00; |
> | For accountants fees | $ 25,000.00; |
> | For disbursement for expenses of their attorneys | $ 8,000.00; |
> | For disbursement for expenses of their accountants | $ 2,000.00; |
>
> *that such allowance shall cover all fees of all attorneys who have appeared in any action, wherever pending, on behalf of Eli B. Castleman, et al., the plaintiffs in this action, and all accountants or others who have rendered any services on their behalf, whether or not such attorneys or accountants have appeared in this Court."* (Emphasis added.)

The Nevada Court, therefore, did not deny counsel fees to Bernard Reich. In the first place the Nevada Court had no jurisdiction to deny fees of counsel in other actions and in other jurisdictions. In the second place Reich was not before the Nevada Court and made no application to that Court. In the third place the Nevada Court awarded fees to the plaintiffs for all counsel, including Reich.

IX.

The District Court Erred in Denying Appellant Reich Fees and Costs Against His Clients, the Plaintiffs.

A. An Attorney Discharged Without Good Cause Is Entitled to His Attorney's Fees on Motion in the Action Which He Was Retained to Prosecute.

Woodbury v. Andrew Jergens Co., 69 F. 2d 49, 50, 51 (C. C. A. 2, 1934);

McCartney v. Guardian Trust Co., 280 Fed. 64 (C. C. A. 8, 1922);

John Griffiths & Son Co. v. United States, 72 F. 2d 466, 468 (C. C. A. 7, 1934);

Ingold v. Ingold, 30 Fed. Supp. 347, 348 (D. C., N. Y., 1939);

Casebolt v. Mid-Continent Airlines, 85 Fed. Supp. 915 (D. C., Minn., 1949).

In the *Ingold* case, *supra,* the Court stated:

"This action, which involves a considerable sum of money, was discontinued after issue joined, by the plaintiff and defendant entering into a stipulation, in and by which they consented to the dismissal of the action. The action is based upon contract; the stipulation was made and entered into and signed by the plaintiff without the knowledge or consent of her attorney, and made and entered into by the defendant with knowledge, either actual or constructive, that the plaintiff's attorney had an interest in the lawsuit by way of his fee.

"True, the plaintiff did discharge her attorney at or about the time of the signing of the stipulation of discontinuance, and the client has a right to discharge her attorney, where he is hired on a contract,

his payment to be a contingent fee, any time before the contract, by its terms is to expire, but the client is liable for the services rendered if the discharge is wrongful. E. Chase Crowley v. Laura A. Wolf, 281 N. Y. 59, 22 N. E. 2d 234, decided July 11, 1939.

* * * * * * * *

"The pertinent part of Rule 41 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, namely, Rule 41(a)(1), was never intended as a cloak whereby a client might settle or discontinue a lawsuit, and disregard entirely the interest of the attorney in the lawsuit. As a matter of fact, Rule 41 was intended for the purpose of setting forth and curbing the right of a plaintiff to discontinue actions, and simplify a practice which heretofore has never been clearly outlined."

B. Notwithstanding a Contingent Fee the Attorney on Discharge Without Good Cause Is Entitled to a Fixed Fee From His Clients.

Woodbury v. Andrew Jergins Co., supra;
John Griffiths & Sons Co. v. U. S., supra;
Ingold v. Ingold, supra.

In its memorandum of August 5, 1954, the District Court stated that counsel should look to his employer for his fee. While it is true that local counsel was employed by New York counsel, Messrs. Kipnis and Mittelman, they acted as agents for the real employers, the plaintiffs. It may be, and it probably is, the fact that Messrs. Kipnis and Mittelman are also liable to local counsel. Nevertheless it is the clients, the principals, who are primarily responsible to local counsel as it was they who, in law, employed the appellant Reich.

Thus, counsel has looked to his employer in this action and the District Court was in error in refusing to entertain jurisdiction to make the award.

In this connection the court may have had the duty to determine whether the discharge was for cause or not. The court could have decided the motion for fees against the plaintiffs on the ground that the discharge was for cause. It made no such determination. It in effect ruled that it had no jurisdiction. In this the District Court was in error.

Moreover the District Court was not always of the same opinion. It once allowed, that fees, if any, would be "mighty small" [R. 371], that counsel should be paid a reasonable fee [R. 372], and that if counsel could not agree on fees, it would fix them [R. 375].

We do not labor the point of amount, since the court refused to exercise the power it undoubtedly possessed.

Conclusion.

> ". . . [A]s far as this court is concerned it is going to put this case to sleep . . . I am not going to hear it and I am not going to do anything with it that I don't have to do . . . I am not going to bother with this mess" [R. 370].

Thus, did the District Court frankly and sincerely express its motivations and the basis for its action or inaction.

Counsel saw his sworn duty to the Court and to the stockholders differently. From the transcript [R. 371]:

> "Mr. Reich: May I address the court for just a few minutes? I promise to be very brief.
>
> The Court: Yes. It doesn't do any good to get into an argument with you.

Mr. Reich: I will stipulate that my fees may be small. I will stipulate you don't have to fix fees at all.

The Court: You don't have to so stipulate.

Mr. Reich: Your Honor, it is important that my position be stated.

The Court: I think I understand your position. And I think if they want to fire you out of the case they should pay you for what services you have rendered. If they won't let you finish your contract I think like anything else, you should be paid a reasonable fee for your services. But I would dislike very much to be holding onto a case when the client wants to fire me.

Mr. Reich: Assume that you are practicing law instead of occupying the bench and assume—

The Court: If I had been practicing law this case wouldn't have been here.

Mr. Reich: Well, your Honor, if you had information that I have—assuming that you had certain information which led you to believe that the stockholders weren't being properly represented wouldn't you feel it was your duty to the court to apprise the court after you had tried to have an understanding with counsel on the other side so that he does represent the clients.

I haven't come to this court. I have been brought into this court. This action was dismissed, your Honor, without my knowledge. Certainly you would have felt the duty as a lawyer as I did to set the record straight—that you had nothing to do with that, particularly if you felt that the roof may fall on top of these plaintiffs' attorneys—that the truth may come out and you didn't want to have anything to do with it.

You would have to come to court just as I did, I am sure, your Honor, and move to vacate a dismissal which had been inadvertently obtained without the only local responsible attorney of record even knowing about it.

The Court: I think you lawyers should get together in an arena of your own and fight it out and settle this case between the lawyers as to who is who in the case without intervention on my part. It is a spectacle to find lawyers fighting among themselves. It doesn't bring any credit upon anybody.

Mr. Reich: Well, your Honor, what would you do about it? What could I do about it? You advise me and I will do it. I just want to do what is right. You tell me what to do and I will do it.

The Court: I am not telling you what to do."

The judgment should be reversed and the case remanded for trial and for other proceedings, including hearings on the petition to intervene, the motion for the appointment of a Special Master, the motion to vacate in part the Order entered January 12, 1954 (quashing process on appellee Hughes), or approval of compromise under Rule 23(c) of the Federal Rules of Civil Procedure, and the motions (2) for attorney fees and costs.

April 1955.

Respectfully submitted,

BERNARD REICH,

Attorney for Appellants.

APPENDIX.

Extract From Reporter's Transcript of Proceedings Had July 12, 1954 [R. 376-381].

MR. REICH: May it please the court. I first used that form of address, your Honor, on December 14, 1937 before one of Mr. McDonald's courts, the appellate division, First Department, in New York City, "May it please the court."

That was the day after I took the oath as an attorney in the same department and in the same court.

I took the oath again as an attorney in this court before the late Judge O'Connor. I was in uniform. And before I was permitted to wear the uniform of our country, your Honor, I took still another oath and not-notwithstanding what I heard the court say this morning, that he thought the action should be dismissed and that no award should be made to me, and that while I did a lot of work I brought this all on myself.

I say to your Honor notwithstanding that and sincerely I feel that I have lived up to those oaths that I took and to the spirit of those oaths.

If I go out of this courtroom defeated and routed, for the moment, I would do the same thing all over again. I think I did and complied in this case with what a lawyer is called upon to do and I want to say this, that in this era of fear and fright and suboenaing of Supreme Court Justices, perhaps even the ex-President of the United States, more than ever now I think that the courts of this country are the real bulwark of democracy and as I think I have had occasion to say to this court before, I think the United States Supreme Court opens, and some of the courts here, open with "God Bless this Honorable Court."

I say it too and I say this knowing also what you said this morning, that I am the real optimist in this courtroom because I have faith in the courts of this country.

I heard the Chief Justice in San Francisco say, your Honor, that the poor and the little people needed advocates and lawyers.

I am one of those little people and I represent little people and what this case stands for to me is the attempt to push little people around, and I thank God that I am an attorney and I can practice before these courts and I can be heard and I can state what I know is going on in this case.

Now, in the ordinary case—the ordinary plaintiff, the ordinary defendant, your Honor, the lawyer for either one of the two has the duty which transcends his particular duty to the particular client to be truthful to the court and to abide by his oath. That is true in any case. It is especially true in a class suit where somebody comes to this court with 2500 shares of stock out of 4,000,000 shares of stock and says: "There is an action which I want to bring, not for myself, for my 2500 shares, but for all the stockholders."

I am concerned now because it would seem, perhaps, that your Honor has not and I want to place in the record if I may, your Honor, as part of these proceedings being held today, what your Honor stated on Monday, October 15, 1953. This is on page 13, line 24.

This is what you said among other things. I am starting on line 24. You said this—I think it was perhaps to all counsel—maybe not to me alone or perhaps you were saying it to me. You said:

> "You are going to get attorney fees but if any attorney fees are fixed in this court they are going to be mighty small if I ever get around to fixing attorney fees. You will wish you had never hit this court, any of you, because I think that if there is any recovery that comes through this court the stockholders are going to get the benefit of it because I feel this case is primarily a lawyers' case all the way through."

And also as part of this record, if your Honor pleases, on the same date and at page 33 beginning with line 21:

> "I know what counsel has brought up. I still stand by my assertion that this is a lawyer's fight. I pity the stockholders if there is any recovery. I wish I had the fixing of the fees. If I did I know no one would want to try the case in my court because I would certainly see that the stockholders got whatever recovery there is."

I feel that what your Honor said this morning is absolutely consistent with what you said on October 19, 1953.

I had hoped, your Honor, that by this late date you would have seen that what I was trying to do had nothing to do with a lawyers' fight as such.

Maybe I was misguided in some way but I thought I owed the court the duty to set forth the facts as I knew them—as Chief Judge Denman thought they should be done in that Independence Coal Mine case.

I say this is not a fight among lawyers except collaterally. It has to be a fight among lawyers if lawyers are going to be participants in the charges that are being

made. Obviously lawyers are going to defend themselves in a situation but what I think this case stands for is whether or not the defendants can pick their arena and make the plaintiffs, who represent a small share of stock, do their bidding and then try to hold prior proceedings bound by what was done in Nevada.

"Now, there are three principal matters before your Honor today. One is the defendant's motion to dismiss. The other is my motion for fees against RKO.

"But I go further than that, your Honor. I say that in a stockholders suit or in any suit, as a matter of fact, where there is a charge of collusion that charge must be tried.

"We will take a divorce case, Williams against North Carolina. Each court has a right to say that the judgment that you obtained out of the state was collusive and therefore we are going to try that issue of collusion.

"That is even more the point in a representative stockholders suit when the very rule, 23, was made to make sure there was not collusion.

"Now, they have got something there, they think. They say that Judge McNamee found under Rule 23-C that there was no collusion. That ends it. That is like pulling yourself up by your bootstraps. I charged collusion in this court. I have evidence of the collusion. I have put it in affidavit form.

"I have also shown that there wasn't—if I haven't shown collusion I have at least shown, let us put it that way, that there was no truly adversary proceeding in Nevada. The plaintiffs were not trying their best. They were interested in whitewashing Mr. Hughes."